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Liability Coverage Issues Raised by Police Misconduct[1]

I. Overview – Law Enforcement Liability

A. Historical Background: Erosion of Immunities

For much of our nation's history, the doctrine of sovereign immunity protected federal and state governments and their employees from civil liability without their consent. The doctrine was based on the English common law maxim that the "King can do no wrong" and, at one time, applied to protect most governmental entities from suit. Over time, the doctrine developed with significant differences among the various states.

By the mid-1900s, sovereign immunity began to erode under the common law with respect to certain actions, and was more generally eroded at the federal level with the passage of the Federal Tort Claims Act in 1946 (28 U.S.C. Sec. 2674). This statute operated to waive sovereign immunity to suit and subjected the government to liability for certain actions. *Id.* Many states thereafter followed suit, enacting similar state tort claims acts, further eroding the immunity previously enjoyed by state entities and employees.

In some states, sovereign immunity does not extend to local or municipal governments or their employees, including those charged with enforcing the law. In others, limited immunities exist and/or procedural laws insulate law enforcement officers from certain suits, but these too have eroded over time. Today, the trend in the law is to permit the imposition of civil liabilities on both governmental entities and their employees for certain types of tortious conduct, albeit with defined exceptions.

[1] This paper is a summary of general information and is intended for discussion only. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of any of the authors' clients, employers, or law firms.

B. Common Claims

One of the primary vehicles for pursuing police officers for alleged misconduct is the Civil Rights Act, codified at 42 U.S.C. Sec. 1983, *et seq*. This statute makes it unlawful for anyone acting under the authority of state law to deprive another person of his or her rights under the Constitution or federal law. *Id.* Some of the most common claims brought against police officers under this statute include claims for false arrest (or false imprisonment), malicious prosecution, and/or those arising from the alleged use of excessive or unreasonable force.

A claim for false arrest is based upon the assertion that a police officer violated the victim's Forth Amendment right against unreasonable search and seizure by arresting the victim without probable cause. To prevail, the claimant must typically show that an officer lacked a sufficient factual basis for a reasonable person to conclude that a crime had been committed. *See, e.g., Posr v. Doherty*, 944 F.2d 91 (2nd Cir. 1991).

A malicious prosecution claim against a police officer is generally based upon an assertion that the officer deprived the victim of his or her Fourteenth Amendment right to liberty. Jurisdictions differ on the standards required to show a constitutional violation resulting from malicious prosecution. State law claims for malicious prosecution can also be pursued, and typically require a showing that the officer commenced a criminal action against the victim, without probable cause; that the criminal action or proceeding was resolved in the victim's favor; and that the officer acted with malice in pursuing the victim. *See, e.g., Donaldson v. Donaldson*, 557 S.W.2d 60, 62 (Tenn. 1977). This type of claim gives rise to heightened levels of potential damages where the victim is or has been imprisoned as a result of the officer's conduct.

A claim based upon the alleged use of excessive or unreasonable force may involve the consideration of a number of factors depending upon the jurisdiction in which the claim is made. Generally, police officers are granted authority to use reasonable force necessary to accomplish lawful objectives, such as to make an arrest, serve a warrant or effect a detention. *Greeman v. Gore,* 483 F.3d 404 (5th Cir. 2007). The lawfulness of the use of force may depend upon factors such as the severity of the crime the officer believed a suspect had committed; whether the suspect presented an immediate threat to the safety of the officer or the public; or whether the suspect actively resisted arrest or attempted to escape. *Graham v. Connor,* 490 U.S. 386 (1989). Courts recognize that police officers must act in tense, rapidly evolving situations, and that their use of force should be evaluated by what was known at the time, not with the benefit of hindsight. *Id.*

In response to a Section 1983 claim, police officers may assert qualified immunity as a defense in situations where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Matthews v. Rakie*, 38 Mass. App. Ct. 490, 493 (1995). Further, if a police officer reasonably believed that his or her actions were lawful in light of clearly established law, based upon the information available at the time, then the officer may be immune from liability. *Davis v. Scherer*, 468 U.S. 183, 191 (1984). In practice,

this defense often requires an examination of whether an individual police officer acted reasonably under the circumstances, based upon an objective standard. *See, e.g., Breault v. Chairman of the Bd. of Fire Commrs. of Springfield*, 401 Mass. 26, 32 (1987), cert. denied, 485 U.S. 906 (1988).

In situations where a police officer has allegedly acted unreasonably, recklessly or even intentionally, he or she may also face potential civil liability through a variety of other state statues and/or the common law. Claims for assault, battery, intentional infliction of emotional distress, trespass, and/or false imprisonment are also commonly asserted in response to alleged police misconduct.

II. Types of Insurance Coverage Targeted to Respond to Law Enforcement Liabilities

A. Commercial General Liability

Historically, police officers pursued in a civil setting for misconduct during the course of their employment turned to commercial general liability (CGL) policies maintained by their employers as a potential source of insurance coverage to defend the officer and/or to respond to any resulting judgment. For several reasons, however, standard CGL policies often fall short of providing coverage to police officers in the context of police misconduct cases.

CGL policies typically respond to sums which an insured is legally obligated to pay as damages due to "bodily injury" or "property damage" caused by an "occurrence" within the policy period. Most often, the term "occurrence" has been defined in the CGL context to mean an "accident," the results of which were not "expected or intended" by the insured.

In police misconduct cases, negligent conduct by a police officer in the course of duty resulting in an injury may be shielded from liability through qualified immunity defenses as noted above. Causes of action arise, however, in situations where an officer is alleged to have acted purposefully, intentionally, and/or with an expectation that the resulting harm would occur. These types of allegations invariably lead to coverage disputes as to whether the case involves an "accident" or "occurrence" within the meaning of a CGL policy.

CGL policies may also respond to sums an insured is legally obligated to pay as damages due to "personal injury" which occurs during the policy period, but only if caused by certain enumerated offenses such as "false arrest" and/or "malicious prosecution." In some instances, claims against police officers do not involve allegations of false arrest or malicious prosecution, but are instead based upon other alleged intentional torts like those described above, which may fall outside the scope of coverage. Similarly, police officers may be pursued for the use of excessive force or injury in a situation where the claimant was a bystander to a crime and was not ultimately arrested or prosecuted.

As with virtually any type of case, the terms of a CGL policy must be examined in the context of a particular police misconduct case to determine whether it will respond (or not).

B. Specialized Policies

Specialized coverages for law enforcement liabilities have developed over the years, in part, to address areas of potential liability which were *not* previously covered through CGL and other more common forms of insurance. Today, police officers or their employers sued for misconduct may alternatively look to Law Enforcement Liability (LEL) policies and/or Public Officials Liability (POL) policies as alternative potential sources of coverage to provide a defense and/or indemnification in police misconduct cases, depending upon the circumstances.

Unlike the terms of a CGL policy, which are fairly standard in the insurance industry, LEL and POL Policies vary significantly depending upon the issuing insurer and the insured involved. They often utilize manuscript forms or endorsements specifically tailored to address the needs of a particular insured, making generalizations about LEL and POL policies difficult.

That being said, LEL and/or POL policies typically share similar features. For example, they are often written on a “claims-made” or “claims-made and reported” basis, limiting the period of time during which a policy will respond to claims. These policies also typically respond to “wrongful acts” by the insured in the course of their duties, often within a defined period of time. LEL coverage often expressly responds to “wrongful acts” which occur only within the course of providing law enforcement services, as opposed to other more administrative conduct by a municipality.

The types of “wrongful acts” covered by LEL or POL policies vary, but may include actual or alleged errors, misstatements, acts or omissions, or other breaches of duty by an officer, including misfeasance, malfeasance, and nonfeasance. “Misfeasance” generally refers to the improper performance of a lawful act; while “nonfeasance” is the failure to perform a legal duty; and “malfeasance”, also known as “misfeasance in public office,” is a wrongful or unlawful act by a public official. *See, e.g., Continental Cas. Co. v. County of Chester,* 244 F.Supp.2d 403, 409 (E.D. Pa. 2003) (citations omitted).

In the latter circumstance, many LEL or POL policies may provide for a defense against allegations of malfeasance, but the insurers’ obligation may end and/or it may not required to indemnify the insured if there is a final legal determination of malfeasance by a police officer insured. *Id.*

III. Trigger of Coverage Issues Raised by Malicious Prosecution/Wrongful Imprisonment Cases

One area which has given rise to significant coverage litigation involves the issue of the trigger of coverage for claims involving or including malicious prosecution. (Keep in mind that most of the litigation at issue has involved CGL policies as opposed to the more specialized, often claims-made LEL or POL policies referenced above.)

Unlike most torts which accrue when an injury or damage is sustained by a claimant, the tort of malicious prosecution accrues when criminal proceedings are favorably terminated. This unique aspect

of the tort of malicious prosecution has given rise to coverage disputes as to when the injury resulting from "malicious prosecution" occurs for coverage purposes. *See St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2014 IL App. 2d 131312 (Sept. 10, 2014), *citing Mueller Fuel Oil Co. v. Ins. Co. of N. America*, 232 A.2d 168 (N.J. Sup. Ct. App. Div. 1967) (the first case to have addressed the issue).

While CGL policies historically provided coverage for claims involving "malicious prosecution," most courts have held that claims for malicious prosecution implicate the policies in effect at the time of the commencement of the prosecution, not those in effect when the claimant is ultimately exonerated. *Id., citing City of Erie v. Guaranty Nat'l Ins. Co.*, 935 F. Supp. 610, *aff'd* 109 F.3d 156, 160 (3rd Cir. 1997); *Royal Indem. Co. v. Werner*, 979 F.2d 1299 (8th Cir. 1992); *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 755 F. Supp. 2d 988 (S.D. Iowa 2010); *Billings v. Commerce Ins. Co.*, 936 N.E.2d 408 (Mass. 2010); *Harbor Ins. Co. v. Central National Ins. Co.*, 165 Cal. App. 3d 1029, 1034 (Cal. Ct. App. 1985); *Town of Newfane v. General Star Nat'l Ins. Co.*, 784 N.Y.S. 2d 787 (N.Y. App. Div. 2004).

Under the majority analysis, the injury which results from malicious prosecution necessarily takes place at or near the time of the prosecution, not later when the individual is exonerated. *See, e.g., N. River Ins. Co. v. Broward County Sherriff's Office,* 428 F.Supp.2d 1284 (S.D. Fla. 2006) (applying Florida law) (the time of arrest and incarceration found to "trigger" insurance coverage for malicious prosecution and false imprisonment cases).

A distinct minority of courts, including the Seventh Circuit Court of Appeals, rejected this approach, reasoning that exoneration is a necessary element of the tort of malicious prosecution. Under the minority view, insurance coverage is necessarily triggered when the cause of action first accrues, and which occurs at exoneration. *See, e.g., Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1125 (7th Cir. 2012); *American Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012); *National Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010). *See, also, Roess v. St. Paul Fire & Marine Ins. Co.,* 383 F.Supp. 1231 (M.D. Fla. 1974) (applying a similar analysis in the context of a civil malicious prosecution case).

All of the Seventh Circuit cases adopting the minority approach were based upon then-existing Illinois law. *Id.* More recently, several Illinois Appellate Court cases expressly rejected the minority view and held that insurance coverage was triggered at the time of a malicious prosecution, relying upon the specific policy language at issue in those cases. *St. Paul v. City of Zion, supra.*; *Indian Harbor Ins. Co. v. City of Waukegan,* 2014 WL 7390865, 2014 IL App. 2d 140293-U (Ill. App. 2d Dist. December 29, 2014 (unreported)).

It is also important to note that none of the courts which have addressed the trigger of coverage for wrongful incarceration cases have adopted a "continuous trigger" or "multiple trigger" of coverage approach, along the lines of that adopted in certain jurisdictions in the context of certain mass torts or other latent injuries which progress over time.

Ultimately, in any case involving alleged insurance coverage for claims of malicious prosecution or other torts leading to wrongful incarceration, the specific claims at issue must be evaluated in light of the express terms of the policy at issue in order to determine whether a particular policy applies. *See,*

e.g., Indian Harbor Ins. Co. v. City of Waukegan, 2014 WL 7390865, 2014 IL App. 2d 140293-U (Ill. App. 2d Dist. December 29, 2014 (unreported)). In the case of more specialized coverages, the timing of the acts necessary to give rise to coverage may be expressly defined in the policy itself thereby eliminating some of the trigger issues which have arisen in the past under CGL policies.

IV. Additional Coverage Issues Raised by Police Misconduct Cases

In the context of police misconduct cases, additional coverage issues may arise relative to the type of damages awarded against a particular officer.

For example, while municipalities are generally immune from liability for punitive damages (*see City of Newport v. Fact Concerts, Inc*., 453 U.S. 247 (1981), which individual law enforcement officers are not. Punitive damages may be awarded against a law enforcement official if he or she acts with "evil motive or intent," or with "reckless or callous indifference" to the claimant's civil rights. *Smith v. Wade*, 461 U.S. 30 (1983).

In some states, it is against public policy to insure against an award of punitive damages, while others allow it or allow it in certain circumstances. In those states that allow insurance coverage for punitive damages, insurers may opt to include exclusions in their policies to expressly preclude coverage for such an award. In either instance, where punitive damages are sought against a police officer, and that aspect of the case is uninsured and/or represents a significant portion of the damages sought against the officer (as is often the case), the defense of the officer by an insurer may give rise to the potential for a conflict of interest, and the law of the jurisdiction should be consulted to evaluate the officer’s rights and the insurers’ obligations in that regard.

In the context of Section 1983 cases against police officers, attorneys’ fees may also be awarded to the "prevailing party" under 42 U.S.C. Section 1988. Specifically, "a reasonable attorney's fee" may be awarded as part of the prevailing claimant’s costs. The award is within the sound discretion of the trial court, although that discretion is not without limits. *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

In situations where an insurance policy does not expressly address coverage for an award of attorneys’ fees under Section 1988, coverage issues may arise as to whether such an award constitutes covered “damages” or potentially excluded “costs.” *See, e.g., Ypsilanti v. Appalachian Ins. Co.,* 547 F.Supp. 823, 828 (E.D. Mich. 1982) (attorneys’ fees awarded under 42 U.S.C. Sec. 1988 covered as “damages”); *Scottsdale Ins. Co. v. City of Hazelton,* 2009 U.S. Dist. LEXIS 44861 *22-24 (M.D. Pa. May 28, 2009), *aff’d* 2010 U.S. App. LEXIS 23187 *1 (3rd Cir. Nov. 5, 2010) (attorneys’ fees awarded under 42 U.S.C. Sec. 1988 were found to be expressly excluded as “costs” within a POL policy).